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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

KIM THU DINH, Plaintiff and Appellant, v. CRIS LEJANO, et al., Defendants and Respondents.	H041828 (Santa Clara County Super. Ct. No. CV252800)

This appeal arises from a jury verdict in a personal injury action based on a car accident. The jury awarded plaintiff Kim Thu Dinh (Plaintiff) $12,000 in damages to cover her medical transport and treatment on the day of the accident, but awarded her nothing for subsequent medical treatment or for pain and suffering. The jury also found Plaintiff was 50 percent at fault, reducing her award to $6,000. The trial court awarded costs to defendants Cris Lejano and Esther Lam (Defendants) and denied Plaintiff's request for costs, further reducing the judgment to $2,225.04. The trial court also denied Plaintiff's motion for new trial.

Plaintiff challenges several pretrial and posttrial orders. Plaintiff contends the trial court abused its discretion and deprived her of a fair trial when it denied her request for a continuance after jury selection due to the unavailability of several key witnesses, and later denied her motion for new trial, or in the alternative for an additur. Plaintiff also contends the trial court erred as a matter of law when it (1) deemed Defendants' offer to

compromise (Code Civ. Proc., § 998) to be valid and reasonable, (2) awarded costs to Defendants, and (3) denied Plaintiff's request for costs. We find that Plaintiff has not met her burden to demonstrate reversible error, and we will affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. PRETRIAL PROCEEDINGS

Plaintiff and Defendant Lejano were in a car accident. Plaintiff sustained injuries and major damage to her car, which was declared a total loss. The other car involved in the accident, which was owned by Defendant Lam, was also damaged. Plaintiff was transported from the accident by ambulance and treated that same day at the hospital emergency room. Ambulance and emergency room expenses totaled $12,157. In the months after the accident, Plaintiff incurred an additional $5,989 in expenses for physical therapy and doctor's visits. Defendants' insurer made settlement offers of $19,876.52 and $20,400 to Plaintiff, which she rejected. Plaintiff filed a complaint for damages against Defendants, alleging causes of action for negligence and negligence per se.

After exchanging written discovery, Defendants served Plaintiff with an offer to compromise pursuant to Code of Civil Procedure[1] section 998 (hereafter "section 998 offer"). The section 998 offer was for $18,000 and included the terms of the offer, the proposed manner of execution of a settlement, and signature blocks for Defendants' and Plaintiff's counsel. Above the signature block for Plaintiff's counsel was the sentence: "Plaintiff, KIM THU DINH, accepts the above offer on the terms stated therein." Plaintiff responded several days later with her own offer, pursuant to section 998, of $25,000. Several months later, Plaintiff issued another offer of $23,000. Neither side accepted the other's section 998 offer.

The trial court held a trial setting conference in early June 2014 and scheduled the trial for September 22, 2014. On July 14, 2014, Plaintiff subpoenaed an intended trial

[1] All unspecified statutory references are to the Code of Civil Procedure.

witness whose car had been stopped behind Plaintiff before she entered the intersection where the accident occurred. Defendants later issued notices of deposition to two of Plaintiff's treating medical providers, Dr. Tran and Dr. Le. On September 3, 2014, Plaintiff objected to the notices, and the depositions did not take place.

Plaintiff served additional trial subpoenas on several treating physicians immediately before and at the start of trial. On September 19, 2014, Plaintiff served Dr. Jun. On September 22, 2014, the first day of trial, Plaintiff served Dr. Liu, Dr. Bristol, Dr. Kline, and Dr. Stiles. Plaintiff was unable to serve Dr. Le, whom Plaintiff had attempted to contact for several months, only to discover in the weeks before trial that Dr. Le had been arrested.

On the morning of September 23, 2014, Plaintiff moved ex parte to continue the trial to November. As good cause for a continuance, Plaintiff cited the unavailability of witnesses, without whom Plaintiff would be deprived of an opportunity to fully and fairly present her case. Plaintiff revealed that she had tried repeatedly to contact her chiropractor but had recently learned of the chiropractor's arrest. Plaintiff also had asked one of her treating physicians to appear without a subpoena, but the physician had demanded an appearance fee of $5,000-$10,000. Plaintiff said she had subpoenaed treating physicians to appear on September 24, 2014, but it was "unlikely" that they would appear "on such short notice." Plaintiff had also contacted her independent eyewitness to the accident to remind him of the trial, and learned that he did not intend to appear. Defendants opposed the request for a continuance.

The trial court heard oral argument and denied Plaintiff's motion to continue the trial. Though the record does not contain a transcript or minute order of the ex parte proceeding, Plaintiff asserts that the trial court's denial of Plaintiff's motion was due at least in part to its concern that the "jury had already been called in." Trial commenced after the motion was denied.

B. POSTTRIAL PROCEEDINGS

The jury's verdict found both parties equally at fault for the accident. It awarded Plaintiff $12,000 for past medical expenses incurred on the date of the accident, and awarded no damages for past and future non-economic damages. It then reduced the judgment to $6,000 to account for its finding that Plaintiff was 50 percent at fault. Several days later, Plaintiff noticed her intent to move for a new trial.

Defendants filed a memorandum of costs on October 7, 2014, requesting $5,044.46. The next week, on October 14, 2014, Plaintiff filed her memorandum of costs, seeking $3,539.15. Several days later, Plaintiff filed a motion to tax costs, contending that Defendant's section 998 offer was invalid and unreasonable. Plaintiff also argued that she was entitled to costs as the prevailing party, and she filed a notice of motion and motion for new trial, or in the alternative for an additur, which Defendants opposed.

On October 30, 2014, Defendants filed their opposition to Plaintiff's motion to tax costs and, in the same opposition, objected to Plaintiff's request for costs on the grounds that (1) Plaintiff had not recovered a judgment more favorable than the section 998 offer, and (2) the court had discretion under section 1033 to deny costs because the judgment was within the jurisdictional limit of a small claims action.

The trial court held a hearing on November 13, 2014 on the posttrial motions. The court ruled that Plaintiff's motion for new trial, or in the alternative for an additur, was not supported by the evidence, as the jury reasonably could have concluded that Plaintiff only met her burden of proof with respect to damages on the day of the accident. The court refused to address other grounds urged by Plaintiff related to the earlier motion for a continuance because Plaintiff had not included those grounds in the noticed motion for new trial. The trial court rejected Plaintiff's argument that Defendants' section 998 offer was invalid, but granted in part Plaintiff's motion to tax costs, eliminating several items from Defendants' cost bill. The trial court denied Plaintiff's memorandum of costs. The

court entered an amended judgment of $2,225.04 in favor of Plaintiff. This timely appeal followed.

II. DISCUSSION

Plaintiff raises two issues on appeal. The first is whether the trial court abused its discretion in denying a continuance of the trial, and subsequently in denying a motion for new trial or, alternatively, for an additur. The second is whether the trial court erred in awarding costs to Defendants and denying costs to Plaintiff.

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTIONS

1. Plaintiff's Motion for a Continuance

Plaintiff contends the trial court compromised Plaintiff's right to a fair trial when it denied her motion for a continuance due to the unavailability of her treating physician witnesses. Continuances are granted only on an affirmative showing of good cause requiring the continuance. (Cal. Rules of Court, rule 3.1332(c); *In re Marriage of Falcone* (2008) 164 Cal.App.4th 814, 823 (*Falcone*).) Good cause may include the unavailability of an essential witness "because of death, illness, or other excusable circumstances." (Cal. Rules of Court, rule 3.1332(c)(1).) The reviewing court will "uphold a trial court's choice not to grant a continuance unless the court has abused its discretion in so doing." (*Falcone*, *supra*, 164 Cal.App.4th at p. 823; see also *Jurado v. Toys "R" Us, Inc.* (1993) 12 Cal.App.4th 1615, 1617 (*Jurado*) [decision to grant or deny a continuance "is within the trial court's discretion and will not be disturbed on appeal absent a clear showing of abused discretion"].)

Plaintiff compares her circumstances to *Jurado*, a personal injury case in which the appellate court found the plaintiff had shown good cause for a continuance on the day of trial because her treating doctors were unavailable to testify. (*Jurado*, *supra*, 12 Cal.App.4th at pp. 1617-1618.) In *Jurado*, Jurardo's counsel served the doctors with subpoenas three months before the trial, then discovered immediately before trial that one

doctor was abroad and the other had moved away. (*Ibid.*) On appeal, the court disagreed with the trial court's conclusion that counsel could have done more to track the witnesses and discover their absence sooner, noting that Jurardo's counsel promptly served both doctors with subpoenas, reasonably followed up before trial, and could not have known or anticipated the doctors would fail to comply with the subpoenas. (*Id.* at p. 1618.)

Plaintiff argues that like in *Jurardo*, serving her treating physicians with subpoenas earlier would have made no difference because Plaintiff could not have known or anticipated their failure to comply with the subpoenas. Plaintiff also argues that service of the subpoenas allowed the witnesses "a reasonable time" to comply. We disagree.

In marked contrast to *Jurardo*, Plaintiff served subpoenas on her medical providers on the eve of trial. Drs. Liu, Bristol, Kline, and Stiles were not served until the trial date, September 22, 2014, and their appearance was requested less than forty-eight hours later, on September 24. Dr. Jun was served on September 19, 2014, the Friday before the Monday trial, with her appearance requested on the following Tuesday, September 23.

Thus, unlike in *Jurardo*, Plaintiff did not "promptly" serve the subpoenas when the trial date was set. (*Jurardo, supra,* 12 Cal.App.4th at p. 1618.) And nothing in the record indicates that Plaintiff's counsel exercised due diligence to secure the appearance of the treating physicians who received subpoenas mere days before their scheduled appearance.[2] (*Id.*) The only exception was Plaintiff's eyewitness to the accident, who

[2] At oral argument, Plaintiff's counsel urged that earlier service of the subpoenas would have been futile because counsel has since learned that the treating physicians' medical group does not allow its physicians to testify in third-party cases. This information does not appear in the record. (See *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813 ["when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered"].) Even if this information had been in the record, it would not change our analysis because earlier service of the subpoenas would have allowed counsel

Plaintiff discovered would not attend the trial despite having received a subpoena two months in advance. On this record, with respect to Plaintiff's treating physicians, we reject Plaintiff's contention that she could not have anticipated her witnesses would fail to appear. Plaintiff did, in fact, anticipate this problem when she moved for the continuance, citing the likelihood the witnesses would not appear "on such short notice."

The court in *Jurardo* cautioned that its ruling was not intended "to promote a casual attitude by attorneys about their witnesses." (*Jurardo*, *supra*, 12 Cal.App.4th at p. 1620.) Similarly, that there is no statutorily prescribed minimum number of days for service of a subpoena on a nonparty witness should not be interpreted as license to delay. The statute governing subpoena service in these circumstances requires that service "allow the witness a reasonable time for preparation and travel to the place of attendance." (§ 1987, subd. (a).) "[A] reasonable time" within the meaning of section 1987 is not defined by the statute or case law. But common sense and professional courtesy indicate that when, as here, the trial date has been set for several months and the witnesses are known and presumably are necessary to establish some aspect of a party's case in chief, demanding their appearance in less than two business days is not "a reasonable time."

The California Rules of Court state that parties and their counsel must regard the trial date as certain and that, although each request for continuance must be considered on its own merits, continuances of trials are disfavored. (Cal. Rules of Court, rule 3.1332(a) and (c); see also Gov. Code, § 68607, subds. (f), (g) [trial court's responsibility to "[c]ommence trials on the date scheduled" and maintain "a firm, consistent policy against continuances, to the maximum extent possible and reasonable"].) We find that good

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to discover the unwillingness or inability of the physicians to comply with the subpoenas. Counsel could then have used this information to substantiate a showing of good cause for a motion to continue, or counsel could have contacted alternative expert witnesses who could have testified based on Plaintiff's medical records.

cause for a continuance of the trial had not been established because the subpoenas to Plaintiff's medical providers did not comply with the statutory requirement for service within a reasonable time, revealing a lack of diligence on the part of Plaintiff's counsel. (See Cal. Rules of Court, rule 3.1332(c)(1); *Falcone, supra*, 164 Cal.App.4th at p. 823 [plaintiff who knew for a month she might not have an attorney at her contempt hearing but waited until the day of the hearing to request the continuance failed to show good cause].) Although the subpoena for Plaintiff's eyewitness was served within a reasonable time, Plaintiff has not shown he was an essential witness whose absence would warrant a continuance of the trial, nor that his absence was prejudicial.

Because Plaintiff failed to show good cause, the trial court did not abuse its discretion in denying her motion for a continuance. In light of this conclusion, we need not reach Defendants' secondary argument that Plaintiff is unable to show harm from the denial of her requested continuance.

2. Plaintiff's Motion for New Trial

Plaintiff also contends that reversal is warranted based on the jury's failure to award past medical damages and non-economic damages despite having found Defendants were negligent. Plaintiff relies on *Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 936 (*Dodson*) to argue that the damages award was inadequate as a matter of law, rendering the trial court's denial of her motion for new trial, or in the alternative for an additur, an abuse of discretion. The trial court rejected Plaintiff's argument based on *Dodson*, noting the jury could reasonably have concluded the evidence was insufficient to support any damages beyond Plaintiff's transportation to the hospital and ER treatment on the day of the accident. In denying Plaintiff's motion for new trial, the trial court acknowledged that "juries sometimes can be difficult to understand" but that "the evidence presented to the jury supports the inference that they've given it."

Appellate review of the denial of a motion for new trial based on the damages verdict generally requires a thorough review of "all the evidence and the entire record." (*Abbott v. Taz Express* (1998) 67 Cal.App.4th 853, 856 (*Abbott*); *Haskins v. Holmes* (1967) 252 Cal.App.2d 580, 584 (*Haskins*).) "The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. . . . As a result, all presumptions are in favor of the decision of the trial court [Citation]." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506-507.) Given the difficulty of measuring damages in personal injury cases, "[w]e do not question the discretionary determinations of jury and judge, so long as they fall within a reasonable range permitted by the evidence." (*Abbott, supra*, 67 Cal.App.4th at p. 857.)

It is the appellant's burden to supply an adequate record. " '[I]f the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.' " (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416, citations omitted.) "This principle stems from the well-established rule of appellate review that a judgment or order is presumed correct and the appellant has the burden of demonstrating prejudicial error." (*Hotels Nevada v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 348.) Issues raised without provision of an adequate appellate record are "deemed waived." (*Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003.) In addition, the rules of appellate procedure require a party to support factual references by proper citation to the record. (Cal. Rules of Court, rule 14(a)(1)(C).)

Here, the record supplied by Plaintiff is inadequate and does not support review of the jury's damages verdict. (See *Haskins*, *supra*, 252 Cal.App.2d at p. 584 [personal injury damages award will not be disturbed unless "found to be inadequate on a fair consideration of the evidence"].) Plaintiff states that she incurred medical expenses from the accident in the amount of $18,172, underwent 15 physical therapy appointments for her injuries, and continued to have pain. But Plaintiff does not support these factual

assertions with any citation to the record, and the record before us does not contain any of the documentary evidence presented at trial or a reporter's transcript of the trial. The failure to supply an adequate record of the trial proceedings leaves this court unable to review Plaintiff's claim relating to the damages awarded to her by the jury. Plaintiff asserts in her appellate briefing, for example, that she underwent 15 physical therapy appointments over three months as a result of the accident, but her underlying motion for new trial—which is part of the record—states that Plaintiff underwent 24 physical therapy treatments for three months. Without an adequate record, we are unable to discern what information was presented to the jury. We also note that to the extent Plaintiff's arguments regarding the trial court's denial of the motion for new trial depend on the damages evidence presented at trial, Plaintiff cannot meet her burden to demonstrate error. In any event, we find no abuse of discretion in the trial court's finding that the evidence presented to the jury supported the verdict awarding only out-of-pocket medical expenses incurred on the day of the accident.

Even if Plaintiff's assertions about the evidence on damages were supported by the record, we do not agree that the jury's damages award was inadequate as a matter of law under *Dodson*, *supra*, 154 Cal.App.4th 931. *Dodson* involved a herniated disc injury from a workplace accident, after which the plaintiff began to experience pain and eventually underwent physical therapy and back surgery. (*Dodson*, *supra*, 154 Cal.App.4th at pp. 933–934.) The jury found the defendant employer negligent and awarded the plaintiff economic damages, including at least some damages for the surgery, but found the plaintiff had suffered no non-economic damages. (*Id.* at p. 935.) On appeal, the court concluded that in light of the jury's negligence findings and award for damages—including surgery—that non-economic damages for pain and suffering could not be zero. (*Id.* at p. 938.) It said, "Where a plaintiff undergoes a serious surgical procedure which a jury's special verdict attributes to an accident caused in part by the negligence of the defendant, the plaintiff must necessarily have endured at least some

pain and suffering, and a damage award concluding otherwise is therefore inadequate as a matter of law." (*Ibid.*)

We do not read *Dodson* as having created a rule that the failure to award damages for pain and suffering produces an inadequate damage award as a matter of law. The holding in *Dodson* was based on the circumstances of that case, and the court expressly stated that not all awards failing to compensate for pain and suffering are inadequate. (*Dodson, supra*, 154 Cal.App.4th at p. 936.) The court relied on another case, *Miller v. San Diego Gas & Elec. Co.* (1963) 212 Cal.App.2d 555, 558 (*Miller*), for the controlling principles behind whether a jury award is inadequate as a matter of law for failure to compensate pain and suffering. (*Dodson, supra,* at pp. 936-937.) As explained in *Miller*: A judgment limited to actual medical expenses would be inadequate in situations in which "the right to recover was established and . . . there was also proof that the medical expenses were incurred because of defendant's negligent act. . . . It cannot be said, however, that because a verdict is rendered for the amount of medical expenses or for a less amount the verdict is inadequate as a matter of law. Every case depends upon the facts involved." (*Miller, supra*, 212 Cal.App.2d at p. 558.)

In *Miller*, the court affirmed the jury verdict awarding the plaintiff only the bare amount of her medical expenses after she suffered an electrical shock. The jury had denied the plaintiff her claims for more extensive medical damages and pain and suffering. The court explained that the record revealed a "substantial conflict" in evidence regarding the extent of the plaintiff's injuries and whether the medical treatments and bills incurred "were rendered necessary by reason of the shock or whether they were necessary at all." (*Miller, supra*, 212 Cal.App.2d at p. 560.) The court further explained that based on the jury's finding of negligence, and the weaker evidence supporting the plaintiff's injuries and medical treatment, it was "entirely probable that the jury felt that although plaintiff was entitled to no more than nominal damages, the kindest disposition of the case was to award to her an amount at least equivalent to her medical

bills." (*Ibid.*) On the facts in *Miller*, the appellate court rejected the argument that the trial court had abused its discretion in allowing the judgment to stand even though the plaintiff was denied non-economic damages. (*Id.* at p. 562.)

The special verdict in this case established only the jury's finding that Defendants' negligence was a substantial factor in causing harm to Plaintiff in the amount of $12,000. Unlike in *Dodson*, in which the jury awarded medical expenses for the plaintiff's back surgery, which necessarily entailed pain and suffering in the undertaking and recovery, the jury award here did not extend to physical therapy or medical expenses after the date of the accident. At the hearing on Plaintiff's motion for new trial, the trial court alluded to what might have been a perceived lack of evidence by the jury: "I mean if the jury did not find sufficient evidence to support a finding for any kind of reimbursement of those medical expenses and they, in fact, only compensated [Plaintiff] for the transportation and ER treatment on the day of the accident, then perhaps they were not convinced and did not find the claim of pain and suffering credible. [¶] Why should I set that aside? … [I]t might have been different had they compensated her for her ongoing physical therapy treatments afterwards. Then I think there might have been a component of pain and suffering for us to discuss."

We find no error in the trial court's application of *Dodson* and *Miller*. Had the jury compensated Plaintiff for ongoing medical treatment, such as the physical therapy appointments, then the comparison with *Dodson*, and argument that pain and suffering could not be zero, could have merit. But Plaintiff has not provided any such record or support for her argument that her medical expenses, totaling $18,172, and continued pain and suffering, "were incurred because of [D]efendant's negligent act." (*Miller*, *supra*, 212 Cal.App.2d at p. 558.) We do not lightly disregard the trial court's observation of the evidence at trial and confirmation of the jury's findings. The amount of damages is a question of fact, committed to the discretion of the jury and to the trial judge on a motion for new trial. (*Seffert*, *supra*, 56 Cal.2d at p. 506.)

We conclude there is no basis to support reversal of the jury award as being inadequate as a matter of law. (*Miller, supra,* 212 Cal.App.2d at p. 558.) Nor does the record suggest that the jury's verdict of $12,000 for medical expenses incurred on the day of the accident falls outside of "a reasonable range permitted by the evidence." (*Abbott, supra,* 67 Cal.App.4th at p. 857; *Da Silva v. Pacific King, Inc.* (1987) 195 Cal.App.3d 1, 11 [plaintiff's damages not inadequate as a matter of law].) We will therefore affirm the trial court's denial of the motion for new trial, or in the alternative, for an additur.

B. THE TRIAL COURT DID NOT ERR IN AWARDING COSTS TO DEFENDANTS

1. Defendants' Request for Costs and Validity of the Section 998 Offer

Plaintiff contends the trial court erred in awarding costs to Defendants because Defendants' section 998 offer was invalid as a matter of law and was unreasonable. Section 998 concerns pretrial offers to compromise. Its purpose is to encourage settlement of litigation without trial. (*Martinez v. Brownco Const. Co., Inc.* (2013) 56 Cal.4th 1014, 1019 (*Martinez*).) "A prevailing party who has made a valid pretrial offer pursuant to . . . section 998 is eligible for specified costs, so long as the offer was reasonable and made in good faith." (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134 (*Nelson*).) "[S]ection 998 provides 'a strong financial disincentive to a party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer.' " (*Martinez, supra,* at p. 1019, quoting *Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 804.)

Under section 998, up until 10 days prior to trial, "any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time. The written offer shall include a statement of the offer, containing the terms and conditions of the judgment or award, *and a provision that allows the accepting party to indicate acceptance of the offer* by signing a statement that the offer is accepted." (§ 998, subd. (b), italics added.) A plaintiff who rejects a valid pretrial offer to compromise and fails to obtain a more

favorable judgment or award at trial is precluded from recovering his or her costs incurred after the offer was made, and the defendant is entitled to recover his or her costs from that same time forward. (*Id.* at subd. (c)(1).)

Plaintiff argues that Defendants' section 998 offer failed to comply with the statutory requirement that the offer include a provision that allows the accepting party to indicate acceptance of the offer. Plaintiff also argues the section 998 offer failed to address attorney's fees and costs and was unreasonable. We review the trial court's determination on the latter argument for abuse of discretion. (*Nelson, supra,* 72 Cal.App.4th at p. 134 [whether offer to compromise "was reasonable and made in good faith is left to the sound discretion of the trial court"].) We independently review whether the offer was invalid for failure to include a mandatory provision. (*Puerta v. Torres* (2011) 195 Cal.App.4th 1267, 1271 (*Puerta*) [invalidity of offer for failure to include mandatory acceptance provision is a question of statutory construction].)

a. Defendants' Section 998 Offer Contained a Valid Acceptance Provision

Defendants' section 998 offer included the following recital directly above the signature block for Plaintiff's counsel: "Plaintiff, KIM THU DINH, accepts the above offer on the terms stated therein." At the hearing on Plaintiff's motion to tax costs, the trial court determined that this recital met the statutory requirement for an acceptance provision. On appeal, citing *Puerta,* Plaintiff asserts this was an error because the recital did not *precisely* comply with the statutory requirement. But a plain reading of section 998, subdivision (b), and recent case law, does not support Plaintiff's proposed interpretation of *Puerta* or of the statute.

In January 2006, amendments to section 998 took effect, implementing the above-referenced language that an offer be in writing and include a provision for acceptance in writing. (Stats. 2005, ch. 706, § 13.) The court in *Puerta* considered as an issue of first impression whether, following the 2006 amendments, a section 998 offer without a

"provision regarding acceptance as set forth in the statute" was valid. (*Puerta*, *supra*, 195 Cal.App.4th at pp. 1269, 1271.) Looking at the plain language of section 998, subdivision (b), the court concluded that the phrase "*shall* include . . . a provision that allows the accepting party to indicate acceptance . . . " was mandatory; hence, an offer without that statement was invalid. (*Id.* at pp. 1272–1273 [italics in original].) The court explained that a mandatory acceptance provision was consistent with the purpose of the 2006 amendments requiring a written offer and acceptance, which was "to eliminate uncertainty by removing the possibility that an oral acceptance might be valid." (*Id.* at p. 1273.) As to the form of the acceptance provision, the court found there was "room for interpretation as to how an appropriate statement regarding acceptance might be phrased in the offer." (*Ibid.*) Because the offer at issue in *Puerta* "contained nothing regarding acceptance, only the terms of the offer itself and its expiration date," it was invalid. (*Puerta*, *supra*, at p. 1273.)

Other recent cases have cited the analysis in *Puerta* with approval. (See, e.g., *Perez v. Torres* (2012) 206 Cal.App.4th 418, 424 (*Perez*) [section 998 requires all offers to contain acceptance provision, therefore noncompliant offer was invalid]; *Boeken v. Philip Morris USA Inc.* (2013) 217 Cal.App.4th 992, 1003-1004 (*Boeken*) [section 998 offer invalid for failing to include required acceptance provision].) These cases also have rejected a strict or singular form of acceptance provision. (See, e.g., *Whatley-Miller v. Cooper* (2013) 212 Cal.App.4th 1103, 1106-1107 (*Whatley-Miller*) [separate acceptance provision, served simultaneous with the section 998 offer, was valid]; *Rouland v. Pacific Specialty Insurance Company* (2013) 220 Cal.App.4th 280, 288 (*Rouland*) [failure to include a signature line or specific acceptance language did not invalidate section 998 offer].)

In *Whatley-Miller*, the appellate court found that a separate "acceptance" document—served together with and in reference to the offer—complied with the statutory requirement for an acceptance provision, where the document provided for

acceptance of the offer, set forth the terms for entry of judgment, and had a place for counsel's signature. (*Whatley-Miller, supra,* 212 Cal.App.4th at p. 1107.) The court explained: "Section 998 does not specify that the acceptance must contain any specific words or that it be made in a particular manner, other than it be in writing and signed by the appropriate person. [¶] . . . [P]laintiffs' offer of compromise is not defective although the provision for its acceptance was not set forth in the offer itself. Section 998 expressly allows the requisite acceptance to be 'made on the document containing the offer *or on a separate document of acceptance*' so long as the acceptance is 'in writing' and 'signed by counsel for the accepting party' . . . . [Italics added.]" (*Id.* at p. 1110.)

Likewise, the section 998 offer in *Rouland* directed the plaintiffs to " 'file an Offer and Notice of Acceptance' " with the trial court within 30 days. (*Rouland, supra,* 220 Cal.App.4th at p. 287.) The plaintiffs argued the acceptance provision was invalid because it contained neither a signature line nor the statutory language that plaintiffs "shall accept the offer by signing a statement . . . ." (*Ibid.* [Italics omitted.]) The trial court agreed with the plaintiffs, but the appellate court reversed. (*Ibid.*) Echoing *Whatley-Miller,* the court reasoned: "Nothing in the statute's language requires an offer to include either a line for the party to sign acknowledging its acceptance or any specific language stating the party must accept the offer[s] by signing an acceptance statement. Indeed, no ' "magic language" ' or specific format is required for either an offer or acceptance under section 998." (*Id.* at p. 288, quoting *Berg v. Darden* (2004) 120 Cal.App.4th 721.) Explaining its earlier decision in *Puerta,*[3] the court emphasized that section 998 did not mandate "strict compliance" with a certain acceptance provision, but only that "at least *some* indication of how to accept [the offer] is required …." (*Rouland, supra,* at p. 289, quoting *Puerta, supra,* 195 Cal.App.4th at p. 1273.)

[3] Both *Puerta, supra,* 195 Cal.App.4th 1267 and *Rouland, supra,* 220 Cal.App.4th 280 are decisions of the Fourth District Court of Appeal, Division 3.

Plaintiff's challenge to Defendants' 998 offer is based on the same, faulty reasoning as that rejected by the courts in *Whatley-Miller* and *Rouland*. In contrast to the offers in *Puerta* and *Boeken*, which contained no provision for acceptance, the acceptance provision in Defendants' offer is in the recital directly below the "offer" paragraph and above the signature block for Plaintiff's counsel. The terms of acceptance and the means for acceptance are unambiguous and in plain sight. We fail to see how Defendants' offer was inconsistent with either the letter or the spirit of section 998, subdivision (b). Plaintiff also offers no support for her argument that the failure to include a term for attorney's fees and costs in the section 998 offer rendered it invalid under the statute. We thus find the trial court did not err in ruling that the form of Defendants' section 998 offer was valid.

b. *The Trial Court Did Not Abuse Its Discretion in Deeming Defendants' Offer Reasonable*

Plaintiff also contends the section 998 offer of $18,000 was unreasonable because it was less than Defendants' pre-litigation offer of $20,400 and Plaintiff's claimed medical expenses of $18,172, and because Plaintiff had no basis to know the reduced amount was justified. Defendants respond that it was apparent in the litigation that Plaintiff would struggle to link her alleged economic damages to the accident, and that written discovery served and received shortly after Plaintiff filed her complaint alerted them to the likelihood they could prevail at trial.

A section 998 offer must be reasonable under the circumstances of the case. (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 696 (*Elrod*).) "Whether a section 998 offer is reasonable must be determined by looking at circumstances when the offer was made." (*Id.* at p. 699.) Courts generally assess reasonableness in two steps: first, "whether the offer represents a reasonable prediction of the amount of money, if any, defendant would have to pay plaintiff following a trial, discounted by an appropriate factor for receipt of money by plaintiff before trial," and

second, "whether defendant's information was known or reasonably should have been known to plaintiff." (*Ibid.* [Footnote omitted.]) "Where the defendant obtains a judgment more favorable than its offer, the judgment is prima facie evidence that the offer was reasonable." (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 471 (*Hartline*), citing *Elrod, supra,* at p. 700.)

It is Plaintiff's burden to show, under the circumstances of the case, that an offer of $18,000 did not represent a reasonable prediction of a monetary judgment Defendants risked paying at trial. Plaintiff appears to argue only that Defendants could not reasonably offer any amount in settlement while also disputing liability, and further that reasonableness may not be determined by the difference between the parties' offers. We are not persuaded that a defendant who disputes liability is unable to make a reasonable and good faith offer to compromise. If this were true, the mechanism and incentives created by section 998 would be ineffective at encouraging settlement before trial. And while the difference between a plaintiff's and defendant's offers may not be determinative of reasonableness, we find no abuse in the trial court's observation of the narrow spread between Plaintiff's $23,000 offer and Defendants' $18,000 offer.

By comparison, in *Elrod,* the court affirmed a finding that a $15,001 offer to compromise was unreasonable. But in that case the plaintiff's severe injuries had rendered him paraplegic, the defendant was aware of its potentially high exposure, and the jury ultimately awarded the plaintiff over $1,000,000. (*Elrod, supra,* 195 Cal.App.3d at pp. 700-701.) Here, the judgment against Defendants for $12,000 amounted to two-thirds of Defendants' settlement offer, which itself was more than three-fourths of Plaintiff's own settlement demand. And because the judgment was less than the offer, it serves as prima facie evidence that $18,000 was a reasonable offer. Plaintiff has not offered persuasive evidence to rebut this presumption. (*Hartline, supra,* 132 Cal.App.4th at p. 471; *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1264 ["the trial result itself

constitutes prima facie evidence that the offer was reasonable, and the burden . . . is on appellants . . . to prove otherwise"].)

Plaintiff similarly offers no support for the contention that she lacked some information or knowledge, which Defendants presumably withheld, in order to determine the reasonableness of the $18,000 offer. The court in *Elrod* explained that this test is an objective one: whether the reasonableness of a defendant's offer is based on information that was known or reasonably should have been known to plaintiff. (*Elrod*, *supra*, 195 Cal.App.3d at p. 700.) Plaintiff's conclusory statement that she "had no reason to believe [Defendants'] offer was reasonable, hence cannot be expected to accept the 'unreasonable' offer," proves nothing more than Plaintiff's subjective belief. Plaintiff relied on similarly unpersuasive reasoning before the trial court, arguing that "at the time the offer was made, there was no evidence identified by the defendants that would warrant reduction [from the pre-litigation amount of $20,400] in the offer." It is Plaintiff's burden on appeal to demonstrate that some required information was withheld or could not have reasonably been known before Plaintiff rejected the offer. On this record, and in light of the factors supporting reasonableness noted above, we conclude that Plaintiff has not met her burden to show the trial court abused its discretion in deciding Defendants' section 998 offer was reasonable.

2. Plaintiff's Request for Costs

As a general rule, the prevailing party in an action is entitled to recover costs, "[e]xcept as otherwise expressly provided by statute." (§ 1032, subd. (b).) Defendants raised two statutory exceptions in their opposition to Plaintiff's memorandum of costs. Plaintiff argues these exceptions should not have been considered because Defendants' opposition was untimely. The pertinent facts are as follows.

Both parties sought to recover their costs following the jury verdict. Defendants filed their memorandum of costs on October 7, 2014, and Plaintiff filed her memorandum of costs on October 14. Plaintiff moved to tax Defendants' costs, and on October 30,

2014, Defendants opposed the motion to tax costs. In its opposition to the motion to tax costs, Defendants separately urged the trial court to deny Plaintiff's memorandum of costs, citing Plaintiff's failure to obtain a more favorable award at trial than was offered in Defendants' section 998 offer. Defendants also noted Plaintiff's failure to recover an amount greater than the jurisdictional limit for small claims court, which pursuant to section 1033 allows the trial court to deny costs, in whole or in part, for the sub-jurisdictional award.

Plaintiff filed a reply brief but did not address the arguments that challenged her entitlement to costs. At the hearing on November 13, 2014, the trial court entertained limited argument on Plaintiff's request for costs. After acknowledging Defendants' counsel's explanation that "the judge has discretion whether or not to award costs" when the verdict amount is less than the limit for small claims court, the trial court denied Plaintiff's memorandum of costs.

Plaintiff asserts that awarding or denying costs is a question of law and should be reviewed de novo. But de novo review of the decision to grant or deny costs is limited to a trial court's application of undisputed facts to an issue of law. (See *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142 [de novo review is warranted where the determination for an award of costs "amounts to statutory construction and a question of law"]; *Acosta v. SI Corp.* (2005) 129 Cal.App.4th 1370, 1374 [same].) The trial court here had to decide (1) whether to consider Defendants' opposition, despite its late filing, and (2) whether to deny the memorandum of costs pursuant to section 1033. These were discretionary decisions by the trial court, which we will review for abuse of discretion.

a. Defendants' Untimely Opposition to Plaintiff's Costs Memorandum

There is no dispute that Defendants' written opposition to the memorandum of costs was untimely by one day. The applicable rules of court allow 15 days, after service of the memorandum of costs, for service of a notice of motion to strike or tax costs. (California Rules of Court, rule 3.1700(b)(1).) Relying on *Douglas v. Willis* (1994) 27

Cal.App.4th 287, 289 (*Douglas*) and *Santos v. Civil Service Bd.* (1987) 193 Cal.App.3d 1442, 1447 (*Santos*), Plaintiff contends the untimely opposition waived any challenge to the costs bill, because once the time for service of a motion to strike or tax costs has passed, the clerk "must immediately enter the costs on the judgment." (California Rules of Court, rule 3.1700(b)(4).) Defendants failed to object within the time authorized, so Plaintiff argues the memorandum of costs became conclusive. (*Oak Grove School Dist. of Santa Clara County v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 698.)

Defendants respond that there was no prejudice in the one day delay because Plaintiff had the opportunity to address Defendants' arguments in her reply brief as well as at the hearing. Defendants also argue the trial court properly considered Plaintiff's entitlement to costs on the merits. Citing *Douglas*, Defendants note that the trial court presumably had discretion to grant statutory relief for the late filing pursuant to section 473 – though Defendants never applied for relief under the statute.

Several factors dissuade us from finding that the trial court erred in considering the opposition to Plaintiff's memorandum of costs. First, it is within the trial court's discretion whether to consider late-filed papers. (California Rules of Court, rule 3.1300(d).) Courts have determined under similar circumstances that "a trial court has broad discretion in allowing relief from a late filing where, as here, there is an absence of a showing of prejudice to the opposing party." (*Hoover Community Hotel Development Corp. v. Thomson* (1985) 168 Cal.App.3d 485, 487-488 (*Hoover*) [court may award costs despite untimely filing of the bill of costs], citing *Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 380–381.) These cases also note that a late-filed bill of costs does not deprive the court of jurisdiction to exercise its discretion to award costs; the time limit on filing for costs is mandatory, but is not jurisdictional. (*Ibid.;* see also *Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 Cal.App.3d 924, 929.) It follows that consideration of a late-filed opposition, or motion to strike or tax costs, also remains within the court's discretion.

In *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44 (*Gorman*), this court considered a similar claim regarding objections to a bill of costs. The plaintiff in *Gorman* argued the defendant had forfeit its objections to the cost claim by failing to file a motion to tax costs, even though the defendant's opposition papers served the same purpose. (*Gorman, supra*, at p. 68.) We noted that it was "clear enough from [defendant]'s opposition what cost claims [defendant] objected to. We perceive[d] no prejudice to plaintiffs, or even a claim of prejudice, from the absence of a more formal motion to tax costs." (*Id.* at p. 69.)

Here, like in *Gorman* and *Hoover*, Plaintiff has not argued or shown prejudice. Plaintiff had ample opportunity to reply to the issues raised by Defendants' opposition and to argue those issues before the trial court. Given the trial court's discretion to consider Defendants' late-filed opposition, and absent any indication of prejudice to Plaintiff, we find the court properly exercised its discretion. We also observe that Rule 3.1700, governing the entry of costs by the clerk after the prescribed time, directs the clerk to immediately enter the costs on the judgment "[a]fter the time has passed for a motion to strike or tax costs *or for determination of that motion*." (California Rules of Court, rule 3.1700(b)(4) [italics added].) The rule thus does not mandate automatic entry of costs upon expiration of the 15-day deadline. It also ties the entry of costs to the court's determination of the merits of a challenge to the costs memorandum.

We do not diminish the importance or necessity of complying with procedural requirements. As the cases cited by Plaintiff aptly demonstrate, failure to comply with mandatory time limits on a cost bill can result in waiver. (See, e.g., *Santos*, *supra*, 193 Cal.App.3d at p. 1447 ["failure to file a motion to tax costs constitutes a waiver of the right to object"]; *Douglas*, *supra*, 27 Cal.App.4th at pp. 289-90 [affirming trial court's denial of plaintiff's application for relief from entry of costs based on finding that plaintiff waived any objections].) But these cases must be viewed in balance with the

trial court's discretion to accept late-filed papers when there is no prejudice and the court can resolve the issue on its merits.

b. Discretion to deny costs pursuant to Section 1033; postoffer costs not available pursuant to Section 998

"The right to recover costs is purely a creature of statute, and the applicable statute defines the extent of a party's right to recover costs." (*Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1279, citing *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 989; *Davis v. KGO–T.V., Inc.* (1998) 17 Cal.4th 436, 439, disapproved on another ground in *Williams v. Chino Valley Independent Fire Dist.*, (2015) 61 Cal.4th 97, 106.) This is clear from the plain language of section 1032, which entitles a prevailing party to recover costs as a matter of right, "[e]xcept as otherwise expressly provided by statute." (§ 1032, subd. (b).) Defendants contend it was appropriate for the trial court to deny costs to Plaintiff after she recovered a judgment of (1) less than the limit for a small claims action (§ 1033), and (2) less than Defendants' offer to compromise (§ 998).

Plaintiff was not entitled to recover costs incurred after Defendants' valid section 998 offer. (§ 998, subd. (c)(1) [plaintiff who rejects defendant's offer and fails to obtain a more favorable judgment "shall not recover his or her postoffer costs"].) Defendants objected to Plaintiff's memorandum of costs on this ground, but there is no indication in the record that Plaintiff addressed the application of section 998, either in her reply to Defendant's opposition or at the hearing on the posttrial motions. Plaintiff's costs memorandum appears to have listed items that postdate Defendants' November 2013 offer,[4] including deposition costs and witness fees for trial. We find no error in the trial court's denial of Plaintiff's memorandum of costs, to the extent those costs were incurred after Defendants' section 998 offer.

[4] It is not clear from the record the precise date of Defendants' section 998 offer, which Plaintiff states was served "[on] or about the first week of November, 2013," and which Defendants state was served four days before Plaintiff's first section 998 offer dated November 16, 2013.

Defendants additionally objected to the award of *any* costs because Plaintiff's recovery of $6,000 was less than the jurisdictional limit for filing a small claims action. Plaintiff argues that Defendants have raised this issue for the first time on appeal, but the record reflects this was one of two grounds on which Defendants opposed Plaintiff's costs memorandum, both in their written opposition and at the November 13, 2014 hearing.

Section 1033 states that "[c]osts or any portion of claimed costs shall be as determined by the court in its discretion in a case other than a limited civil case in accordance with Section 1034 where the prevailing party recovers a judgment that could have been rendered in a limited civil case." (§ 1033, subd. (a).) When a plaintiff brings an unlimited civil action but recovers a judgment within the jurisdictional limit for a limited civil or small claims action, the trial court has discretion to deny costs to the plaintiff. (§ 1033, subds. (a), (b); *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 983.) The purpose of section 1033 is to encourage the plaintiff to bring an action in the appropriate forum and " 'to discourage plaintiffs from "over filing" their cases' and thereby 'wast[ing] judicial resources.' " (*Carter v. Cohen* (2010) 188 Cal.App.4th 1038, 1053; *Steele v. Jensen Instrument Co.* (1997) 59 Cal.App.4th 326, 330 (*Steele*).)

We review the trial court's denial of costs under section 1033 for abuse of discretion. (*Steele*, *supra*, 59 Cal.App.4th at p. 331.) " 'Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566, quoting *Loomis v. Loomis*, (1960) 181 Cal.App.2d 345, 348-349.)

The trial court did not explain its ruling on the record and heard only cursory argument from counsel as to the application of section 1033 to award or deny costs.

Although "[t]he absence of an explanation of a ruling may make it more difficult for an appellate court to uphold it as reasonable, . . . we will not presume error based on such an omission." (*Gorman, supra*, 178 Cal.App.4th at p. 67.) To the contrary, " '[a]ll intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown.' ([*Denham, supra*, 2 Cal.3d at p. 564].)" (*Ibid*., quoting *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140.)

The only error to which Plaintiff points was presumably that of the trial court's failure to find waiver and to enter Plaintiff's costs as "conclusive." We have already concluded that the trial court's decision to consider Defendants' opposition was a valid exercise of the court's discretion. Indeed, because of the interplay between sections 998, 1032, and 1033, it was appropriate for the trial court to consider on the merits Plaintiff's entitlement to costs. But there is no statutory guidance as to the factors that may be considered in the court's exercise of discretion to deny all or some of a prevailing party's costs under section 1033. We therefore consider certain factors identified by the courts, including " 'plaintiff's assessment of his chances of recovery beyond the jurisdiction of [unlimited civil] when he filed his action—whether reasonable and in good faith—the amount of the recovery—looked at in relationship to the maximum amount of the municipal court jurisdiction—and the amount of costs incurred.' " (*Dorman v. DWLC Corp.* (1995) 35 Cal.App.4th 1808, 1816, quoting *Greenberg v. Pacific Tel. & Tel. Co.* (1979) 97 Cal.App.3d 102, 108 [italics omitted].)

Here, Plaintiff filed an unlimited civil action but recovered less than the jurisdictional limit for a small claims action. Also, Plaintiff and Defendants' offers to compromise, respectively $23,000 and $18,000, both came within the lesser jurisdictional limit of a limited civil action. And although Plaintiff requested only $3,539.15 in costs, it appears from the record that not all of those costs were recoverable based on Plaintiff's decision not to accept Defendants' section 998 offer. In light of these circumstances and absent any contrary showing by Plaintiff, we find Plaintiff has not met her burden to

show the trial court abused its discretion by denying her memorandum of costs. Accordingly, we will affirm the trial court's entry of costs for Defendants only.

III. DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

Márquez, J.

WE CONCUR:

Rushing, P.J.

Premo, J.

No. H041828